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Supreme Court, U.S.
FILED
MAR 2 1999

No. 98-899

In the Supreme Court of the United States

OCTOBER TERM, 1998

GERALD FRANK PLUNK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in holding that an experienced narcotics detective was an expert in drug trafficking techniques.

2. Whether the district court abused its discretion in permitting that expert to testify about code words used by petitioner in recorded telephone conversations with other cocaine distributors.

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OPINIONS BELOW

The opinion of the court of appeals addressing eight of the issues raised by petitioner (Pet. App. 1-43) is reported at 153 F.3d 1011. The opinion of the court of appeals addressing five additional issues (Pet. App. 44-46) is unpublished, but the judgment is noted at 161 F.3d 15 (Table). An opinion amending the reported opinion of the court of appeals is reported at 161 F.3d 1195.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1998, and was amended on November 24, 1998. A petition for rehearing was denied on November

24, 1998. 161 F.3d 1195.[1] The petition for a writ of certiorari was filed on November 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846; four counts of using a communication facility in the commission of a drug trafficking crime, in violation of 21 U.S.C. 843(b); and one count of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner was acquitted on one count of distributing cocaine. The jury did not reach a verdict on the three remaining counts against petitioner, which included one count of operating a continuing criminal enterprise, in violation of 21 U.S.C. 848; one count of distributing cocaine; and one count of conspiring to distribute cocaine. Petitioner was sentenced to life imprisonment.[2]

1. In 1992, petitioner, an established cocaine dealer in Anchorage, Alaska, met with members of the Cali Cartel to discuss ways of smuggling cocaine from Colombia into the United States. Pet. App. 9-10. Petitioner was asked to coordinate the transportation of cocaine from Los Angeles and Houston to the New

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[1] The court's order of November 24, 1998, stated that petitioner's "suggestion for rehearing en banc will be dealt with in a separate order." 161 F.3d at 1196. The court has not issued that order.

[2] Petitioner's co-defendant, Timothy Pierson, was indicted on three counts of the superseding indictment, but was tried separately. A jury found Pierson guilty on one count of conspiring to distribute cocaine and two counts of using a communication facility in the commission of a drug trafficking crime. The court of appeals affirmed. *United States* v. *Pierson*, 121 F.3d 560 (9th Cir. 1997).

York City area. *Id.* at 10. He recruited drivers to transport shipments of approximately 200-250 kilograms of cocaine in recreational vehicles and produce trucks. *Ibid.* Petitioner successfully directed approximately two dozen of these shipments. *Ibid.*

In December 1993, authorized wiretaps revealed the existence of a large conspiracy to transport cocaine across the United States. Pet. App. 10-11. Many of the monitored telephone calls were placed from a number registered in petitioner's name. *Id.* at 11. An authorized wiretap of petitioner's cellular telephone caused agents to stop a motor home driven by Hal Booher. *Ibid.* Agents searched Booher's vehicle and discovered 220 kilograms of cocaine. *Ibid.* Booher identified petitioner as his employer, and an ensuing search of petitioner's home uncovered several firearms, a scale, and nearly $10,000 in cash. *Ibid.*

2. At petitioner's trial, the government called Detective Jerry Speziale of the New York City Police Department as an expert witness "in the field of narcotics trafficking, including wiretapping investigations, analysis of codes, words, and reference[s] used by narcotics traffickers." Pet. App. 13. Over petitioner's objection, the district court qualified Detective Speziale to provide expert testimony under Federal Rule of Evidence 702 about his "specialized knowledge of how drug trafficking is sometimes conducted and * * * the methods and techniques that may be employed." Gov't C.A. Br. 16. Detective Speziale testified about code words used by drug traffickers and interpreted encoded conversations between petitioner and his co-conspirators. Pet. App. 13. The court cautioned the jury that Detective Speziale's interpretation of the conversations was "only an opinion" and that it was up to the jury "to decide whether to believe any, all, or none

of that opinion." Gov't C.A. Br. 18. Petitioner was convicted on six of the ten counts against him.

3. The court of appeals affirmed. Pet. App. 1-46. Of particular pertinence here, the court of appeals rejected petitioner's argument that the trial court should not have allowed Detective Speziale to testify as an expert because his testimony lacked the requisite "scientific basis" under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pet. App. 13-14. The court of appeals stated that *Daubert* does not apply to non-scientific expert testimony. *Id.* at 14. Rather, expert testimony based on "technical" or "specialized" knowledge is subject to "a more traditional Rule 702 analysis." *Ibid.* The court then determined that "Detective Speziale's testimony concerned a proper subject of expert testimony," because "the jargon of the narcotics trade and the codes that drug dealers often use constitute specialized bodies of knowledge." *Id.* at 15. The court also upheld the district court's ruling that Detective Speziale was qualified as an expert on that subject. *Id.* at 15-16. The court of appeals concluded that the district court acted "well within the bounds of its discretion in qualifying Detective Speziale as an expert and allowing him to testify as such regarding the cryptic codes and jargon of narcotics dealers." *Id.* at 16.

The court of appeals rejected petitioner's contention that Rule 704(b) of the Federal Rules of Evidence, which prohibits expert testimony "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged," should have barred Detective Speziale from testifying about the meanings of code words used in recorded telephone conversations between petitioner and his associates. Pet. App. 16-18. The court reasoned that "nothing in Speziale's testimony" comprised an explicit

opinion or compelled the conclusion that petitioner "intended or knew anything in conjunction with the crimes charged." *Id.* at 17. Rather, Detective Speziale "offered his opinion about the meaning of drug jargon in encrypted exchanges between the conspirators, allowing the jurors to determine for themselves the legal significance of the conversations as interpreted." *Ibid.*

ARGUMENT

Petitioner presents eleven questions in his petition for a writ of certiorari (Pet. i-iii) and raises additional issues in his February 22, 1999, motion to stay proceedings. Only questions four and five of the petition, which involve the admission of expert testimony under the Federal Rules of Evidence, warrant a response.

1. Petitioner asserts (Pet. 23-25) that the district court erred in qualifying Detective Speziale as an expert in narcotics trafficking techniques and allowing him to testify on the meaning of code words used by drug traffickers. That argument is without merit. The district court has discretion to allow or disallow such testimony based on the court's assessment of whether the testimony is relevant and reliable. See *General Elec. Co.* v. *Joiner*, 522 U.S. 136 (1997) (abuse of discretion standard applied in reviewing trial court's decision to admit or exclude expert testimony). The court of appeals correctly concluded that the district court did not abuse its discretion.

As the United States explained as amicus curiae in *Kumho Tire Co.* v. *Carmichael*, No. 97-1709 (argued Dec. 7, 1998), Rule 702 requires the trial court to exclude expert testimony that does not rest on a reliable foundation or that is not relevant to the matters in dispute. 97-1709 U.S. Amicus Br. at 10-11. This Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals*,

Inc., 509 U.S. 579 (1993), articulates that principle and also provides specific guidance with respect to the trial court's screening of "expert scientific testimony." See *id.* at 592-595. Contrary to petitioner's apparent suggestion (Pet. 25-26), that decision does not require that the lower courts mechanically apply the Court's specific guidance respecting scientific evidence to other types of expert testimony. See *id.* at 590 n.8 ("[o]ur discussion is limited to the scientific context because that is the nature of the expertise offered here"). As the Court made clear, the Rule 702 inquiry is a "flexible one." *Id.* at 594. The fundamental inquiry in every case is whether the expert's testimony "rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597.[3]

The court of appeals' judgment in this case is consistent with *Daubert*. The court properly inquired whether Detective Speziale's testimony was relevant and reliable by examining whether the testimony would "assist the trier of fact" and whether Speziale possessed the "requisite qualifications" within "his claimed area of expertise." See Pet. App. 14-15. The court correctly concluded that the trial judge did not abuse his discretion in admitting the testimony. As the court of appeals explained, "the jargon of the narcotics trade and the codes that drug dealers often use constitute specialized bodies of knowledge—certainly beyond the ken of the average juror—and are therefore proper subjects of

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[3] Contrary to petitioner's implicit suggestion (Pet. 27), there is no reason for the Court to hold the petition here pending the decision in *Kumho Tire*. No party in that case contends that *Daubert*'s precise analysis respecting scientific expert testimony must be mechanically applied to expert testimony of the type at issue here, and there is no basis for concluding that *Kumho Tire* would undermine the district court's evidentiary ruling in this case.

expert opinion." *Id.* at 15. The court also correctly concluded that Speziale was well qualified through his extensive experience as an undercover officer to testify on those matters. *Id.* at 15-16. The court of appeals' fact-specific determination that the trial judge had properly exercised his discretion in examining those matters presents no matter warranting this Court's review.

Petitioner's contention (Pet. 25) that the court of appeals' decision conflicts with that court's previous decision in *United States* v. *Jones*, 24 F.3d 1177 (9th Cir. 1994), is without merit. Even if this Court were to review intra-circuit conflicts, *Jones* does not conflict with the court of appeals' decision in this case. In *Jones*, the Ninth Circuit held that the district court did not abuse its discretion in excluding a proffered expert's voice identification testimony as "not expert testimony." 24 F.3d at 1180. The court explained that the witness "had no specialized training in voice analysis, had authored no articles in the field, had read only one article three years previously dealing with voice analysis, and did not know of the existence of a professional organization that certifies voice examiners." *Ibid.* Here, in contrast, the court of appeals upheld the district court's determination that Detective Speziale was an expert in drug trafficking methods and techniques, noting the district court's findings "that Speziale (1) possessed extensive experience working undercover in large-scale drug trafficking organizations, (2) had served as an instructor to the FBI and the DEA on wiretap techniques, and (3) had listened to more than 350 wiretaps in which narcotics traffickers were communicating using codes and other jargon." Pet. App. 15-16.

2. Petitioner further contends (Pet. 24-27) that, even assuming that Detective Speziale was an expert in drug trafficking techniques, the trial court should not have allowed him to testify about the meanings of code words used in wiretapped telephone conversations between petitioner and other drug traffickers. Petitioner identifies no decisions from other courts of appeals that conflict with the court of appeals' decision in this case. To the contrary, petitioner relies on two decisions (Pet. 26) that support the district court's decision to admit Detective Speziale's testimony about code words. See *United States* v. *Griffith*, 118 F.3d 318, 321 (5th Cir. 1997); *United States* v. *Delpit*, 94 F.3d 1134, 1144-1145 (8th Cir. 1996).

In *Griffith*, the Fifth Circuit held that the district court did not abuse its discretion by allowing a law enforcement officer to testify about the meaning of two conversations between the defendant and another drug trafficker. 118 F.3d at 322-323. The court noted that "there is a specialized jargon endemic to the illegal drug distribution industry" and that "[i]t is implausible to think that jurors can understand such arcane allusions without expert assistance." *Id.* at 321. Similarly, in *Delpit*, the Eighth Circuit affirmed a district court's admission of expert testimony from a police officer who "gave the jury his opinion about the meaning of certain code words and slang terms." 94 F.3d at 1144. The court explained that it is "well established that experts may help the jury with the meaning of jargon and codewords" and noted that there is "no more reason to expect unassisted jurors to understand drug dealers'

cryptic slang than antitrust theory or asbestosis." *Id.* at 1145.[4]

Petitioner also cites (Pet. 24-25) other Ninth Circuit decisions that, according to petitioner, dictate a different result. See *United States* v. *Morales*, 108 F.3d 1031 (9th Cir. 1997) (en banc); *United States* v. *Bailey*, 607 F.2d 237 (9th Cir. 1979), cert. denied, 445 U.S. 934 (1980). The court of appeals properly distinguished those decisions, which neither create an intra-circuit conflict nor provide reason for this Court to review the court of appeals' decision in this case. Pet. App. 16-18.

In *Morales*, the Ninth Circuit explained that Rule 704(b) of the Federal Rules of Evidence "only precludes expert testimony of an opinion or inference that the defendant did or did not have the requisite *mens rea* and testimony of an opinion or inference which if true would compel the conclusion that the defendant did or did not have the requisite *mens rea*." 108 F.3d at 1041. The court of appeals in this case found "nothing in Speziale's testimony that comprises an explicit opinion that [petitioner] intended or knew anything in conjunction with the crimes charged" and "nothing in the testimony [that] necessarily compels such an inference or conclusion." Pet. App. 17.

As the court of appeals explained, the *Bailey* decision did not disallow testimony about specific words used by the defendants in that case, but "simply noted that the trial judge had excluded such testimony." Pet. App. 17.

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[4] Petitioner also cites (Pet. 26) a Second Circuit decision in which the court stated that it had "repeatedly upheld the use of expert testimony by government agents to describe the characteristics and operating methods of narcotics dealers," but did not reach the question whether the district court erred in admitting particular testimony in that case. *United States* v. *Boissoneault*, 926 F.2d 230, 232-233 (1991).

Bailey "express[ed] no view as to whether the prosecution's proposed procedure would have been proper." 607 F.2d at 240 n.8. See Pet. App. 17-18. Petitioner's disagreement (Pet. 24) with the court of appeals' analysis of *Bailey* does not present an issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1999